

PROCUREMENT REQUIREMENTS



CHAPTER 20

PROCUREMENT RECORDS

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CHILD NUTRITION PROGRAMS PURCHASING REQUIREMENTS

This chapter discusses procurement. Procurement means the same as purchasing. The two terms are interchangeable and you will see the term procurement used in most USDA guidance.

Regulations for Sponsors of USDA Programs

- Child Nutrition Programs are governed by federal, state and local procurement standards for the purchase of food, supplies, and equipment.
- According to regulations, all procurement transactions shall be conducted in a manner to provide, to the maximum extent, practical, open, and free competition.
- RA's must follow the strictest guidelines for procurement whether they are Federal, State or Local.
- 7 CFR Part 3016 –addresses requirements for grants and cooperative government agreements to state and local governments
- 7 CFR Part 3019 – addresses requirements for grants with institutions of higher education, hospitals and other non-profits
- 7 CFR Part 3052 – addresses requirements for audits of state, local governments and non-profit groups.
- OMB Circular – is the compliance Supplement Section

Competitive Sealed Bids or Proposals are required for purchases totaling \$25,000 (State of Idaho Small Purchase Threshold) or more annually. Bids should be requested often to keep competition strong to obtain the best prices. The following are components of the Competitive Sealed Bid:

- Invitation to Bid or Request for Proposal
- List of vendors for item(s) to be purchased
- If list of vendors is less than five, advertise for bids
- Request bids at least quarterly for food items and more frequently for produce

Price Quotations can be used for purchases totaling \$25,000 (State of Idaho Small Purchase Threshold) or less annually. The following are components of the price quotations:

- Prepare list (with specifications) of items to be purchased
- Submit request for price quotations to at least three vendors
- Request quotations as needed

Definition and Examples of Aggregate Purchasing

- A contract covering an estimated \$30,000 of milk or milk products to be delivered throughout the year would be subject to the requirement of the competitive sealed bid or proposal.
- A \$9,000 procurement of canned fruits and vegetables for delivery during a three month purchase period would not be subject to the competitive sealed bid requirement even though the total amount of canned fruits and vegetables purchased over the course of the year could exceed \$25,000.

Grocery List can be used for purchases by very small schools or sponsors. Determine purchases to be made (item and amount) and check prices from at least two sources (by phone or from newspaper).

For more information go to [www.fns.usda.gov/cnd/whats new.htm](http://www.fns.usda.gov/cnd/whats_new.htm) and enter procurement in the search function.

Purchasing Cooperatives

Advantages

- Maximize buying power;
- Each member brings knowledge to the team;
- Decreased food cost;
- Low overhead costs

Disadvantages

- Decreased flexibility;
- Change makes some people uncomfortable;
- Forming a cooperative is very time consuming

For information regarding cooperatives in your area, contact the State Agency Child Nutrition Programs at (208)332-6820.



**United States
Department
of
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USDA is an equal
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Instructions for Procurement Roadmap

When making a purchase, it is important to determine if a formal procurement process is necessary. In order to make this determination easier, we are providing the attached two-page chart.

Before you begin, you need to know the value of the purchase or contract that your organization will make, and for which program-- childcare (CACFP), school lunch (NSLP), or summer food (SFSP)-- the purchase or contract will be made.

Start at the top of Page 1. From the three columns, select the one which corresponds to the program for which you will make a purchase. In that column, answer the first question. Questions are contained in oblong shapes that look like this 

Answer this question, and the other questions you encounter while using this sheet, with either a "Yes" or a "No"



If your answer is "Yes," follow the diamond that appears to the right of the question. Follow the arrow-line from the diamond to find the next question or instruction.



If your answer is "No," follow the diamond that appears to the left of the question. Follow the arrow-line from the diamond to find the next question or instruction.

Note: This question or instruction will not necessarily appear in the same column.

1 Private nonprofits that run the NSLP/SFSP are governed by the purchasing requirements in 7CFR3019 and other applicable Federal laws, regulations, and OMB circulars. Since the purchase is over \$100,000, a formal procurement process is necessary.

2 Private nonprofits that run the NSLP/SFSP are governed by the purchasing requirements in 7CFR3019 and other applicable Federal laws, regulations, and OMB circulars. 7CFR3019 sets the small purchase threshold at \$100,000. Unless the nonprofit has voluntarily adopted a lower small purchase threshold, no formal procurement process is necessary.

3 Public agencies that run the NSLP/SFSP are governed by the purchasing regulations in 7CFR3016 and other applicable Federal laws, regulations, and OMB circulars, as well as State and local laws. Since the transaction amount is more than \$100,000, a formal procurement process is necessary.

4 Public agencies that run the NSLP/SFSP are governed by the purchasing regulations in 7CFR3016 and other applicable Federal laws, regulations, and OMB circulars, as well as State and local laws. Unless State or local laws establish a purchase threshold less than \$100,000, no formal procurement process is necessary.

5 Private nonprofits that procure vended meals or foodservice management contracts for SFSP are governed by the purchasing requirements in 7CFR225.15(h), 7CFR3019 and other applicable Federal laws, regulations, and OMB circulars. Since this transaction is worth less than \$10,000, no formal procurement process is necessary unless the nonprofit has adopted a lower small purchase threshold.

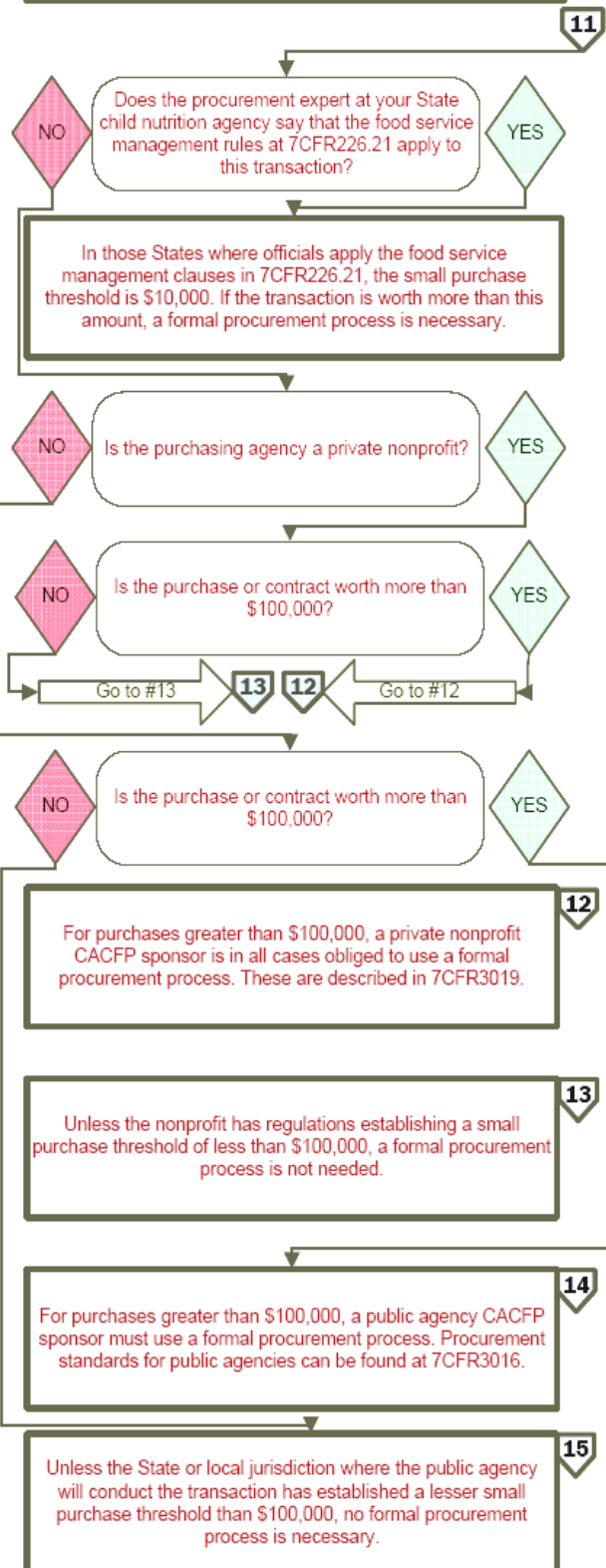
6 Private nonprofits that procure vended meals or foodservice management contracts for SFSP are governed by the purchasing requirements in 7CFR225, 7CFR3019 and other applicable Federal laws, regulations, and OMB circulars. Since this transaction is worth more than \$10,000, a formal procurement process is necessary.

7 Public agencies that procure vended meals or foodservice management contracts for SFSP are governed by the purchasing regulations in 7CFR3016 and other applicable Federal laws, regulations, and OMB circulars, as well as State and local laws. Since the transaction amount is more than \$10,000, a formal procurement process is necessary.

8 Public agencies that procure vended meals or foodservice management contracts for SFSP are governed by the purchasing regulations in 7CFR3016, 7CFR225.15(h) and applicable Federal laws, regulations, OMB circulars, as well as State and local laws. Unless State or local laws establish a purchase threshold less than \$10,000, no formal procurement process is necessary.

9 For-profit organizations that participate in the CACFP program are governed by 7CFR226.22, applicable Federal laws and regulations, OMB circulars, and applicable State/local laws. 7CFR226.22(h) establishes a small purchase threshold of \$10,000. Since the transaction is worth more than that, a formal procurement process is necessary.

10 For-profit organizations that participate in the CACFP program are governed by 7CFR226.22, applicable Federal laws and regulations, OMB circulars, and applicable State/local laws. 7CFR226.22 establishes a small purchase threshold of \$10,000. Since the transaction is worth less than that, a formal procurement process is not necessary.



(SAMPLE)

PROCUREMENT POLICY

CODES OF STANDARDS

Any officer, employee, or agent of the (School Food Authority), who has occasion to handle school food or monies, shall perform his/her duties in a manner consistent with good business practices. This shall include prohibition of:

1. Solicitation or acceptance of gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub agreements.
2. Participation in awards or administration of contracts to firms in which the employee, or any member of his/her immediate family has a financial or other interest.

Where financial interest is not substantial, or the gift is unsolicited, and of nominal intrinsic value, such interest shall be documented and approved by (School Food Authority), before acceptance.

Penalties or other disciplinary actions for infractions of this policy will be based on the seriousness of the violations. Disciplinary actions may include, but are not limited to:

1. Written disciplinary report filed in individual's personnel file;
2. Suspension of duties;
3. Termination of employment;
4. Prosecution by legal authorities.

Distribution Instruction

This policy shall be incorporated into the General Operation Policy Manual of the (School Food Authority), dated _____, and shall be reviewed annually by the Executive Director or School Board. Copies of this policy are to be distributed to all personnel who have occasion to handle school food, monies or supplies, together with their supervisors and program directors.

Signature

Frequently Asked Questions Regarding Procurement

- (1) If all our schools are equipped with a specific brand of coolers, for which we maintain a supply of replacement parts, and for which our maintenance staff is trained to repair, would we be able to request a specific brand, make, and model as a replacement?

ANSWER:

Yes, with the approval of the State Agency (SA). Generally, restricting the procurement to a brand name or specific product is not permitted (§3016.36(c) (VI)). However, situations do arise when a School Food Authority (SFA) has a compelling need, such as compatibility with current equipment, to purchase a brand specific item. In this example, when supporting its request for permission to conduct a procurement for a specific brand of cooler, at a minimum, the SFA would need to document all of the following: The other available brands of coolers are not compatible with the SFA's: (1) current equipment, (2) replacement part inventory, and (3) maintenance staff's expertise. The SA can impose additional requirements prior to approving a brand name procurement.

If approved, the SFA would still need to maximize competition in the brand specific procurement. In the situation presented, there may be more than one equipment distributor carrying the specific product. When an adequate number of equipment distributors did exist, the SA would approve the SFA to conduct a sealed bid procurement to acquire the replacement cooler. In conducting this procurement, the SFA needs to be alert to situations where suppliers are affiliated or associated, which could result in collaboration or restrict competition. On the other hand, if only one supplier is available nationally, the SA can authorize the SFA to conduct a noncompetitive negotiation with that one supplier, if noncompetitive negotiation is allowed under applicable State and local rules.

- (2) Is the situation described in Question 1 sole source procurement?

ANSWER:

No. Although a situation exists in which a specific make and model is needed, this is not sole source procurement. In the Child Nutrition Programs, sole source procurement occurs only when the goods or services are available from only one manufacturer through only one distributor or supplier. While the specific cooler described in question 1 is only available from one manufacturer, it is highly unlikely that there will be only one national distributor of that cooler.

- (3) What is the difference between a noncompetitive negotiation and sole source procurement, since both involve negotiating with a potential supplier?

ANSWER:

Noncompetitive negotiation is a procurement method used to compensate for the lack of competition, while sole source describes a condition of the procurement environment.

As stated in the answer to question 2, sole source situation occurs when the goods or services are only available from one manufacturer through only one supplier. In a true sole source situation conducting a traditional solicitation (sealed bid, competitive negotiation or small purchase) is a meaningless act, because the element of competition will not exist. When faced with an actual sole source situation, an SFA must first obtain State agency approval, and then go directly to the one source of supply to negotiate terms, conditions and prices.

Often, sole source situation is confused with a lack of competition, which occurs when an SFA receives an inadequate number of responses to its solicitation. This lack of competition may result from overly restrictive solicitation documents, an inadequate number of suppliers in the area, or the procurement environment may have been compromised by inappropriate supplier actions, i.e., market allocation schemes. Unlike sole source in which a solicitation is not issued, noncompetitive negotiation occurs after the solicitation (sealed bid, competitive negotiation or small purchase) has been issued, but competition on that solicitation has been deemed inadequate.

Noncompetitive negotiations are restricted to specific situations and may only be used when: (1) there is inadequate competition in a formal competition, (2) a public emergency exists, or (3) the awarding agency provides prior approval. Regardless of the circumstance, due to the absence of full and open competition, a contract cannot be awarded unless negotiations are actually conducted with one or more potential contractors. Negotiations must include both price and terms using the same procedures that would be followed for competitive proposals.

- (4) Can a distributor, that carries multiple brands of pizza, bid and receive an SFA's pizza contract if the distributor wrote the SFA's pizza specification?

ANSWER:

No. 7 CFR Part 3016.36(b) prohibits an SFA from entering into a contract with a potential contractor that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use in conducting a procurement. Regardless of the number of pizza products available through the distributor, if a distributor wrote the specification used in the SFA's pizza bid, the distributor is not eligible for the award.

However, if the distributor simply provided information to the SFA about all or only one of its pizza products, and the SFA wrote its own pizza product specifications, the distributor would still be eligible to compete for the procurement. 7 CFR Part 3016.36(b) is not concerned with potential contractors that simply provide information, but rather with those individuals and firms that are actually writing specifications, evaluation criteria, and other contract terms and conditions.

SFAs must have sufficient information to develop well-written specifications and procurement solicitations. SFAs can obtain adequate and pertinent information through a variety of sources, including trade shows, market research, conferences, and discussions with manufacturers and suppliers. Using all of these resources allows the SFA to develop a well-written solicitation that promotes full and open competition, which in turn leads to competitive responses and the best products and services at the best price.

- (5) What are the “other documents” referenced in this phrase from 7 CFR Part 3016.60(b): “In order to ensure objective contractor performance and eliminate unfair competitive advantage, ...a person that develops or drafts specifications, requirements, statements of work , invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or sub grantee in conducting a procurement under the USDA entitlement programs...shall be excluded from competing for such procurements.”?

ANSWER:

“Other documents” refers to any documents that are used in any aspect of procurement. This can include, but is not limited to, evaluation criteria, ranking criteria, bidder responsibilities, bidder requirements, SFA procurement practices, contract terms and conditions, payment terms, and SFA contract administration procedures. It is important to remember, that procurement is not limited to the solicitation process but includes all of the elements of the process from the initial determination that goods or services are needed through the retention of records following the expiration of the contract.

- (6) We would like to use a pre-approved product list. Do SFAs need to get prior approval from the SA to use a pre-approved products list?

ANSWER:

Yes. While 7 CFR Part 3016.36(c) (4) allows for the use of pre-approved or pre-qualified lists of persons, firms, or products, an SFA should always check with its SA concerning applicable State laws. The SFA should also check with appropriate local procurement officials to ensure pre-approved product lists are permitted under applicable local procurement laws.

(7) Can I limit bidders to a pre-approved suppliers/pre-approved products list?

ANSWER:

Yes, as long as you are not prohibited from using such lists under applicable State and local laws and the SFA's procurement procedures still ensures maximum open and free competition. The procedures the SFA will follow when conducting a procurement using a pre-approved suppliers list depends on the procedures that were used to place the suppliers on the list. Some pre-approved supplier lists are nothing more than mailing lists of potential suppliers, i.e., any supplier that may be interested in competing for the SFA's business can be included on the list. In other cases, suppliers and their products are subject to comprehensive competitive evaluations and must compete with other suppliers before being included on the list. When using the "mailing list" form of a pre-approved supplier list, the SFA must still develop comprehensive procurement documents, complete with adequate specifications and evaluation criteria and must still publicly announce the solicitation, in addition to contacting the potential suppliers on the list.

With the second form of pre-approved suppliers list, a technical evaluation of the supplier's products and eligibility to participate in a contract with the SFA occurs prior to adding the supplier's name to the list. In some cases, the prices of the products have been established through this competitive process, but not delivery or handling charges. When using this form of pre-approved supplier, the SFA would initiate a competitive procurement for those features that had not previously been subject to competition, but can limit responsive bidders to those suppliers/products on the pre-approved list.

In all cases, the SFA must make sure that (1) the list is current; (2) a suitable number of qualified sources exist on the list; (3) when applicable, the product or services on the list are specific in nature, not just a general such as food, supplies, etc.; (4) all potential suppliers had the opportunity to be included on the list; (5) when applicable, all potential suppliers were subject to the same evaluation and ranking criteria; (6) suppliers that did not request or when applicable, compete, for inclusion on the list are not on the list; (7) lists are updated at least annually; (8) the opportunity exists to add new qualified suppliers; (9) potential suppliers are not prohibited from qualifying for inclusion on the list during the solicitation period; and (10) a system exists to remove listed suppliers, for cause.

- (8) We have received a memo from FNS dated October 13, 2004, regarding SFAs copying specifications directly from Horizon Software materials for their solicitations. Is FNS aware of SFAs directly copying specifications from other companies associated with school food service?

ANSWER:

Our office has received anecdotal information regarding SFAs directly copying specifications and feature descriptions from companies, other than Horizon, for use in solicitation documents for software services, as well as for management company services, food purchases, and food service equipment purchases. The purpose of the memo, dated October 13, 2004, was to remind SFAs of the provisions of §3016.60(b). As you are aware, §3016.60(b) prohibits an SFA from entering into a contract with a person that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use in conducting a procurement.

In many instances, the company may not be aware that an SFA has copied available company information verbatim, or a SFA may utilize the specifications from another SFA's solicitation without knowing that the original solicitation itself was improperly copied from a company's literature, specification, website, etc.

- (9) Often SFAs will share bid specifications and other documents. What steps should a SFA take to make sure that these documents were not drafted by a potential contractor?

ANSWER:

An SFA that uses another SFA's solicitation or contract documents, should always inquire as to the origin of the information so that they do not unintentionally violate the provisions of §3016.60(b). The SFA should pursue its inquiry until the original author of the documents is identified.

- (10) A few years ago, I attended a session at the American School Food Service Annual Conference in Minneapolis, Minnesota on factors to consider when writing bid specifications for software systems. Is it a problem if I use information from the handout I received at that session to help me prepare the specifications for my software procurement?

ANSWER:

No. FNS encourages SFAs to obtain information from as many sources as possible when developing procurement specifications. The handout referenced in Question 10 provided general information and was not specific to any one potential contractor's system.

- (11) Are Farm-to-School efforts exempt from the prohibition on using in-State or local geographic preferences?

ANSWER:

No. Section 4303 of the Farm Security and Rural Investment Act of 2002 adds a new paragraph (j) at the end of section 9 of the Richard B. Russell National School Lunch Act pertaining to purchases of locally produced products. The provision requires the Secretary to encourage institutions participating in the school lunch and breakfast programs to purchase locally produced foods, to the maximum extent practicable.

However, in review of the Committee Notes to the 2002 Farm Bill, page 124 (note 53), although encouraging the purchase of locally produced product, Section 4303 does not allow for geographic preferences, "It is not the intent to create a geographical preference for purchases of locally produced foods or purchases made with grant funds." The notes continue by stating, "The Managers want to make clear that SFAs are still required to follow federal procurement rules calling for free and open competition and limit local product purchases to those that are practicable." Therefore, although school food authorities participating in the National School Lunch and School Breakfast Programs are encouraged to purchase locally produced foods, to the maximum extent practicable, this provision does not permit SFAs to use in-State or local geographical preferences. SFAs should always remember that all purchases must be made competitively, consistent with Federal and State procurement laws and regulations.

- (12) Does USDA's efforts to promote Farm-to-School mean schools do not have to follow procurement rules?

ANSWER:

No. Although the Farm-to-School initiative was developed to encourage schools to purchase fresh fruits and vegetables from small, local farmers and growers, SFAs must make all purchases in accordance with all Departmental procurement regulations and applicable State and local laws and statutes. However, this does not preclude SFAs from identifying potential local farmers or providing these farmers with its procurement solicitations. Further, an SFA can inform its local farmers of its interest in particular fresh fruits and vegetables so that the local farmers may plan future crop plantings accordingly. It is important to note that Farm-to-School purchases are often less than the applicable small purchase threshold. In these cases, SFAs are able to use these relatively simple, informal procedures to obtain these desirable products.

Finally, all produce purchases made through the Department of Defense meet USDA procurement regulatory requirements and SFAs may pursue Farm-to-School goals through coordination with the designated DoD Produce Buying Office.

- (13) Our State laws exempt SFAs from following procurement rules. Does this mean that we are exempt from the requirements of Part 3016?

ANSWER:

No. State or local laws may not exempt SFAs from following the Federal requirements of the National School Lunch Program. In the absence of State or local laws, rules and statutes, a public SFA must follow minimum procurement requirements at §§3016.36(b) through (i) and 3016.60.

- (14) Our State laws exempt the purchase of perishable products from procurement rules. Does this mean that we are exempt from the requirements of Part 3016?

ANSWER:

No. Similar to Question 13, State or local laws may not exempt SFAs from following the Federal requirements of the National School Lunch Program. When purchasing perishable products such as produce and dairy, one effective approach is to use a fixed price contract with economic adjustment for the product and fixed fee for the delivery. This form of contract provides for upward and downward revisions of the stated contract price based upon specified events using indexes or standards, such as the CPI or Dairy Market Measures. This allows suppliers to protect against wide price fluctuations in the market, thereby providing more competitive and favorable bids for SFA solicitations.

- (15) Our State agency requires that we use a mandated prototype contract when contracting with a food service management company. The management company we selected has returned our State prototype contract with a couple of adjustments that they say will help us save money. Can I allow them to do so?

ANSWER:

Since the prototype contract was developed and its use is mandated by the SA, only the SA can decide whether it will permit changes to that document.

- (16) Can a school food authority (SFA) enter into sole source contract with a supplier that advertises itself as the sole provider of a product or service in the marketplace?

ANSWER:

No. In the Child Nutrition (CN) Programs, a sole source situation only occurs when the goods or services are available from only one manufacturer through only one distributor or supplier. The decision that a sole source situation exists must be made by the SFA, not the supplier. While one supplier may offer goods and services that contain features not available from other suppliers, the SFA must be able to document that those specific features are required, not just preferred. Since sole source procurement takes place without the benefit of competition, an SFA must maintain appropriate documentation that supports its decision.

SFAs should be reminded that a sole source situation is a condition of the procurement environment not a procurement method. Again, while a supplier can claim its products are the sole products available in the marketplace that meet the SFA's needs, the advertisement alone doesn't make the claim true. SFAs that fail to validate such claims may subsequently enter into improperly procured contracts.

(17) What happens if an SFA enters into a sole source contract improperly?

ANSWER:

When solicitation and contract deficiencies are identified, the SFA cannot fund the contract costs, including any ongoing and maintenance costs, from the nonprofit food service account. This result can impose a substantial burden on the school district. Thus, if the SFA is unsure whether a sole source situation exists, we recommend the SFA contact its State agency to obtain prior approval before proceeding.

(18) Can an SFA amend an existing contract to add a new deliverable such as a point of service system (POS) at the recommendation of their food service management company (FSMC), when the FSMC has indicated that the company providing the POS is a preferred provider of the FSMC?

ANSWER:

Generally not if the new deliverable represents a material change to the contract. Prior to deciding whether to amend an existing contract or conduct a new procurement, the SFA must first determine whether the amendment is permitted under the terms of its original solicitation and resulting contract. Additionally, public SFAs must also determine whether the amendment would be permitted pursuant to applicable State and local procurement requirements. When the amendment was not addressed in the solicitation documents, then the SFA must determine if the amendment creates a material change to the existing contract. Material changes are changes that are substantial enough that had other bidders been aware of the change during the bidding process they might have bid differently. If the amendment creates a material change, the SFA must either conduct a separate procurement to obtain the deliverable or conduct a new solicitation for a FSMC that includes the deliverable.

(19) Is there a dollar threshold that must be used when determining whether a change to an existing contract is material?

ANSWER:

No. While the cost of a proposed amendment is a factor that SFA should use in determining whether a proposed change is material, there is no minimum threshold. As discussed in the answer to Question 3, a key factor in determining materiality is whether other bidders knowing of the change would have bid differently.

- (20) How should an SFA determine whether a purchase should be made using sealed bidding or competitive proposals?

ANSWER:

When deciding whether sealed bidding using an invitation for bid (IFB) or competitive proposals using a request for proposal (RFP) should be used, the SFA needs to consider a number of factors. Commercially available items should be acquired using the sealed bidding method because the items can be adequately identified, ancillary services such as delivery and handling can be specified, and the requirements for a responsible and responsive bidder can be described. When these conditions exist, the only remaining factor in the award of the contract is cost.

On the other hand, when developmental work is needed, the acquisition generally lends itself to competitive proposals. In developmental acquisitions, the expectations and outcomes can usually be met by more than one method and acceptable offers will differ both technically and financially. When deciding to use competitive proposals, the SFA must also have sufficient skill and expertise to evaluate and rank proposals and conduct negotiations with top offerors. Since the response to an RFP consists of two distinct elements, the technical proposal and the cost proposal, the negotiation process requires significant experience and skill in negotiation. SFAs that don't possess staff with effective negotiation skills may have to incur additional costs to allow for the contracting of an individual(s) with the appropriate negotiation skills, which is another factor that SFAs must consider.

- (21) Doesn't using an RFP allow a SFA to award a contract without price being the most important factor?

ANSWER:

No. The goals of sealed bidding and competitive proposals are the same. These goals are to obtain the best product/proposal at the lowest price. Part 3016.36(d) (3) (IV) provides that when using the competitive proposal method, the award is made with "price and other factors considered". Price is listed first because it is the primary factor in the award of a contract when using competitive proposals. While we are aware that many view the competitive proposal method as a means to avoid considering cost in the award of a contract, such views contradict Department regulations and good business practices. The only acquisition not subject to price consideration is the evaluation of qualifications-based procurement of architectural/engineering (A/E) professional services (Part 3016.36(d) (3) (v)). This method, "where price is not used as a selection factor", is only available for the procurement of A/E professional services, which rarely occurs in CN programs. "It cannot be used to purchase other types of services". (Ibid.) Because price is the primary contract award factor when using competitive proposals, FNS recommends the use of the two-step RFP process. Under this process, technical proposals are solicited, evaluated and ranked before cost is considered. Once the SFA has identified its top-ranked offerors, the SFA enters into negotiations with these

offerors. These negotiations are directed at obtaining equivalent, not necessarily equal technical proposals, any of which would meet the SFA's needs. Once equivalent proposals are obtained, the SFA requests these offerors submit best and final prices. The award is then made to the offeror submitting the lowest price since all of the negotiated offers have been deemed acceptable.

SFAs that do not use the two-step approach must develop evaluation and ranking criteria that identify cost as a primary factor. Once the technical and cost components of the proposal have been evaluated and ranked, the SFA negotiates both components. This form of negotiation can be very complex since both the technical and cost components will be changing throughout the negotiation process. At the conclusion of these negotiations, the award is made to the offeror presenting the most advantageous proposal, with price used as the primary factor in the award decision.

(22) Must SFAs always negotiate when using competitive proposal method?

ANSWER:

While the negotiation phase is not mandated, the primary benefit of this procurement method is lost if negotiations are not conducted. An SFA that will not be exercising its rights to negotiate should seriously evaluate whether competitive proposals are the appropriate procurement method for its planned acquisition since it can obtain the same results using sealed bidding.

(23) Recently, one of our public SFA's received a bid protest. Should we send the protest to FNS?

ANSWER:

No. Pursuant to 3016.36(b) (12), SFAs must have procedures in place to handle disputes relating to their procurements and are responsible for resolving bid protests.

(24) With the price of rising fuel costs, my distributor asked me to include a price adjustment in our current contract to help him recover some of his costs associated with these increases. I can see his argument. Can I give him an increase?"

ANSWER:

Price changes are permitted only when the SFA included terms for these price changes in its solicitation and contract documents. When the SFA agrees that a price adjustment factor is appropriate but did not include the adjustment factor in its procurement documents, the SFA needs to conduct a new procurement that includes the adjustment factor.

- (25) My contract with a distributor is a fixed price for the products for the entire term (12 months) of the contract with a fixed fee for delivery and service expressed as a percentage of the product fixed price as. Is this a “cost plus percentage of cost” contract.

ANSWER:

No. The contract described in question 17 is a fixed price for goods with a service fee expressed as a percentage of the fixed cost. In an actual cost plus percentage of cost contract, the percentage mark-up is added to the cost of the product, which is not fixed but changes over the term of the contract. This is the type of cost plus percentage of cost contract that is prohibited by §3016.36(f) (4). An example of a prohibited cost plus percentage of cost contract provision would be: “The distributor will be paid the cost of goods plus 10% of these costs.” In this type of pricing structure the distributor is rewarded for increased costs, and therefore has no incentive to provide the SFA with the best pricing available.

In the contract described in the question, the contractor will receive a fixed price for the product, and a distribution fee based upon the percentage of the fixed product cost. Since the price of the goods does not change for the contract period, the distribution fee in effect will remain the same, and therefore it is also fixed. The distributor only increases its revenue based upon the actions of the SFA, i.e., increased purchase volume, and not through its own actions, i.e., the purchase of higher-priced product.

- (26) Can a food service management company (FSMC) act as the school food authority’s (SFA) agent to procure automated accountability systems (point of service, inventory, financial management, etc.)?

ANSWER:

Generally, the SFA can use a single contractor to perform more than one function. For example, an SFA can contract with a FSMC to manage its food service and act as its procurement agent for acquiring an automated accountability system. However, the SFA must ensure that its procurement solicitation and contract identifies the scope of duties the FSMC must fulfill and the FSMC’s responsibilities as the agent of the SFA. The solicitation and contract documents should also include a description of the procedures the FSMC must follow in procuring the automated accountability system since the FSMC, as the SFA’s agent, must comply with the same requirements the SFA would use to procure the system. The solicitation and contract documents must also identify whether the SFA or the FSMC as the SFA’s agent will sign the contract with the successful system’s bidder. Finally, the SFA should include an adequate description of how the FSMC will be paid for these services and how the SFA will pay for the system.

- (27) Some FSMCs apparently have pre-existing arrangements with specific software companies. Is this a problem if the SFA seeks to use a FSMC that has such an arrangement for its automated accountability system?

ANSWER:

While it is not a problem in the procurement of the FSMC, it may render the FSMC's software partner ineligible to compete for the SFA's software acquisition. Department regulations at 7 CFR Part 3016 prohibits the participation of an employee, officer or agent in the award or administration of a contract when an actual or apparent conflict of interest exists. A conflict of interest can arise when the employee, officer or agent or an organization which employs or is about to employ any of the preceding has a financial interest in the firm selected for award. If the SFA's solicitation document for a FSMC requires the FSMC act as the SFA's agent to acquire the automated accountability system, then the FSMC must follow the same procurement procedures that SFA would use to obtain the software system. Since the FSMC has a pre-existing relationship with a specific software partner at least the appearance, if not an actual, conflict of interest, could arise.

- (28) Can the SFA issue a FSMC procurement solicitation that requires the FSMC provide an automated accountability system?

ANSWER:

Yes, but there are factors the SFA must consider. First, the SFA must develop its own software and hardware specifications for the automated accountability system and include those with its FSMC procurement solicitation. The ranking and evaluation of a combined FSMC and automated accountability system solicitation will require a higher degree of technical expertise than would normally be required to obtain a FSMC. Second, the SFA needs to ensure that it has not unduly restricted competition by requiring the FSMC provide both food service management and the automated accountability system. Third, the SFA needs to remember that it will not "own" the software system, but will only have access to it for the period of its FSMC contract. This means that the automated accountability system must be viewed as a one year acquisition since its FSMC contract is only a one-year contract (with up to 4 one-year renewals).

- (29) As an alternative to question 3, can the SFA issue a FSMC procurement solicitation that requires the FSMC provide an automated accountability system that the SFA will own?

ANSWER:

Yes. However, the SFA will still need to develop its software and hardware specifications so that the system it acquires is not dependent on the renewal of its FSMC contract. Additionally, the SFA must ensure that the automated accountability system is not integrated with FSMC's system so that it would be able to function with another FSMC or a self-operated food service.

- (30) Are there any other factors an SFA needs to consider when it seeks to combine its procurement of some type of automated accountability system with its procurement of a FSMC?

ANSWER:

Yes, there are a number of other factors the SFA needs to consider. Among these are that the automated accountability system may require multi-year implementation. If a multi-year approach is required, it cannot be dependent upon the renewal of its FSMC contract. Second, if the automated accountability system's cost will be amortized over more than one year, non-renewal of the FSMC's contract cannot cause acceleration of the payment schedule without approval of the SFA. Third, if the automated accountability system will include student eligibility information, the SFA must ensure adequate controls exist to prevent improper use or disclosure of that information. Fourth, the SFA needs to ensure any automated accountability system is compatible with its school district's current and long term automation plans including its district's requirements for software and hardware compatibility and integration. Finally, if the FSMC will use a subcontractor to provide the automated accountability system, the SFA needs to determine the extent to which it will have authority to accept or reject a particular subcontractor and whether subcontracting is permitted under applicable State and local rules.